Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

October Term, 1996

RICHARD G. KAYNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

Francis J. DiMento
BBO#125000
DiMENTO & SULLIVAN
Seven Fanueil Hall Marketplace,
Third Floor
Boston, Massachusetts 02109-1649

Balmar Legal Publishing Department, Washington, D.C. (202) 682-9800

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QUESTION PRESENTED

The First Circuit upheld a ruling by the trial court permitting a Postal Inspector to read aloud to the jury from more than one-hundred (100) certificates assigning numerical grades to a like number of rare coins. The Court of Appeals ruled the opinions contained in the certificates were admissible as business records under Fed. R. Evid. 803(6). It further held the reliability requirement of the Confrontation Clause to have been satisfied by virtue of the fact that the business records doctrine is a "firmly rooted" hearsay exception.

This case presents the question as to how far Fed. R. Evid. 803(6) will be permitted to override a criminal defendant's Sixth Amendment right of confrontation and the protections built around expert testimony by Fed. R. Evid. 702 and 705. Has the concededly "firmly rooted" business records exception to the hearsay rule advanced to the point where it will now permit a jury to hear a recital of certificates assigning highly subjective numerical grades to more than one-hundred (100) rare coins, where the experts are unknown and the coins themselves are unavailable?

LIST OF PARTIES

In addition to the United States and Richard G. Kayne (captioned parties), Edward B. Kalp was a co-defendant to the proceeding in the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit.

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For The First Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard G. Kayne, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 24, 1996, in order to resolve the important issues presented herein.

OPINIONS BELOW

The judgment of the of the United States District Court for the District of Massachusetts, dated March 21, 1994, is attached at Appendix A.

The opinion of the United States Court of Appeals for the First Circuit, dated July 24, 1996, that gives rise to this petition is reported *sub nom. United States v. Kayne*, at 90 F.3d 7. The judgment and opinion are attached at Appendix B and C.

JURISDICTION

On July 24, 1986, The United States Court of Appeals for the First Circuit issued a judgment and opinion affirming a criminal conviction. The jurisdiction of the Court is invoked pursuant to 12 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE

U.S. Const. Amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . . to be confronted with the witnesses against him . . . .

Fed. R. Evid. 702 provides:

> If scientific, technical or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 705 provides:

> The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to he underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Fed. R. Evid. 803(6) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (6) A memorandum, report, record or data compilation, in any form of . . . . opinions . . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity . . . .

Fed. R. Crim. Proc. 16(a)(1)(E)

(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony the government intends to use under rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. This summary must describe the witnesses opinions, the bases and reasons therefor, and the witnesses' qualifications.

18 U.S.C. 1341 Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner Richard G. Kayne was found guilty of violating 18 U.S.C. 1341 (Mail Fraud) following a six-week trial in 1993. In 1982, Richard Kayne and Edward Kalp established the Rare Coin Galleries of America ("RCGA"). Kalp, the President of RCGA, functioned as the in-house numismatist, examining and valuing coins for purchase from wholesalers, and pricing them for resale. Kayne, as the marketing director of RCGA, recruited financial planners and solicited customers. It was alleged that Kalp so overgraded coins that the coin sales constituted mail fraud. The principal thrust of the defense was that the defendant Kalp had correctly graded all coins in accordance with the standards of the American Numismatic Association ("ANA").

The government, in anticipation of this challenge, presented two witnesses, Caleb Morgan ("Morgan") (5:32) and Anthony Scapicchio ("Scapicchio") (6:102), who had obtained through the mails in late 1986 certifications of RCGA coins directly from ANACS, a coin grading service operated by the ANA in Colorado Springs, Colorado. The ANACS certificates graded some one-hundred (100) coins at a much lower level than the grades assigned by Kalp. These valuations were central to the petitioner's case.

Prior to the testimony of Morgan and Scapicchio, Richard S. Montgomery, a former grader for the ANA, had testified as to the procedure followed by the ANA in grading coins (4:53-56). On that basis, over objection by the defendants, the trial court admitted the certificates obtained by Morgan (5:42; Ex. 30-K). Thereafter, when Scapicchio testified, the court reversed itself and excluded the certificates (6:120; Ex. 29-U), for the reason that the government had not produced the grader. Also on motion of the defendants, the court struck the certificates relating to the Morgan coins (6:159-161).

Then, at the very end of the government's case-in-chief, the court reversed itself again and permitted Postal Inspector Kevin McDonough to read from the witness stand an itemization of all the Morgan and Scapicchio coins, some one-hundred (100) of them, all graded MS65 by Kalp, but with much lowers grades shown on the ANA certificates (18:51-57). Since the coins themselves had been disposed of by Morgan and Scapicchio prior to trial, Kalp's assertion that he could defend his grade as to any coin shown to him was all that the defendants could muster against this attack. The hearsay provided proof of an element of the offense, i.e., intent, on all counts and struck at the heart of the defense that all of the coins were correctly graded by Kalp in accordance with ANA standards.

The impact of this expert testimony was evidenced by the single question asked by the jurors, after deliberations began, of the trial judge: "To the Honorable Judge Woodlock re: additional evidence/testimony. Would it be possible for the jury to obtain the ANACS certificates that were read into testimony by William [sic] McDonough" (24:2-4). The court refused to permit the jury to examine the certificates, but of course the very recent memory of the recitation by Postal Inspector McDonough remained. Both Kayne and Kalp were found guilty of fifteen counts of mail fraud.

Kayne properly appealed the judgment to the United States Courts of Appeals for the First Circuit, which, on July 24, 1996, affirmed the District Court judgment.

In upholding the District Court's decision to admit the government's evidence, the First Circuit held that Kayne had no claim under the Confrontation Clause of the Sixth Amendment because the expert opinions were admissible under the business records exception to the hearsay rule.

REASONS FOR GRANTING THE WRIT

I. The First Circuit's Opinion Carries Rule 803(6) And The Business Records Doctrine To A New Level, Going Far Beyond Reports Of Scientific Opinion, And One Which Other Circuits Have Rejected.

Petitioner Kayne was convicted of fifteen counts of mail fraud under 28 U.S.C. 1341. The United States Court of Appeals for the First Circuit upheld the admission of a recital of certificates assigning numerical grades to more that one-hundred (100) rare coins as a business record under Fed. R. Evid. 803(6). It further held the reliability requirement of the Confrontation Clause to have been satisfied by virtue of the fact that the business records doctrine is a "firmly rooted" hearsay exception, citing *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736 (1992) and *Manocchio v. Moran*, 919 F.2d 770 (1st Cir. 1990), *cert. denied*, 500 U.S. 910 (1991). *United States v. Kayne*, 90 F.3d 7, 13 (1st Cir. 1996), (App: a17 - a18).

In *Manocchio*, the First Circuit conceded that "autopsy reports are *not* a firmly rooted hearsay exception". (emphasis added) *Manocchio* at 784. However, because they are the product of expert scientific judgment reached in accordance with "statutorily regularized procedures and established medical standards", *id.* at 778, the court held that the autopsy report in question "possesses sufficient particularized guarantees of trustworthiness to be received in evidence regardless of the absence of the medical examiner who wrote it and performed the autopsy." *Id.* at 784.

Appellant does not dispute that business records are a "firmly rooted" hearsay exception. He does, however, contend that the certificates in this case are a no more "firmly rooted" exception than was the autopsy report in *Manocchio v. Moran, supra.*

a. MECHANICALLY OBJECTIVE TESTS AND REPORTS

Fifth, Eighth and Tenth Circuits

As a general rule mechanically objective tests have been held admissible by the circuit courts which have dealt with the issue. The Fifth Circuit in *Sherman v. Scott*, 62 F.3d 136 (5th Cir. 1993), held a drug analysis report admissible. The defendant challenged the court's allowance of the report because it was admitted through the testimony of a laboratory supervisor instead of the chemists who prepared the report. Quoting *United States v. Baker*, 855 F.2d 1353 (8th Cir. 1988), the court said, "[w]hen made on a routine basis, laboratory analyses of controlled substances are admissible as business records under Federal Rules of Evidence 803(6)." *Sherman* at 141.

The court found that the report had "particular guarantees of trustworthiness" and that cross-examination of the chemists who prepared the report would be of little utility to the defendant. *Id.* at 142. This finding was based on the supervisor's testimony regarding both his own qualifications and those of the chemists who prepared the report. He additionally described the analytical procedures involved in determining the composition of unknown substances and testified that the report indicated that the chemists followed these standard testing procedures. *Id.*; *see also*, *Minner v. Kerby*, 30 F.3d 1311 (10th Cir. 1994) (police chemist's notes admissible; "The notes concern mechanically objective tests performed on the powder.")

Again, in *United States v. McCormick*, 54 F.3d 214 (5th Cir. 1995), the Fifth Circuit determined that a urinalysis report was admissible and did not violate the defendant's right of confrontation. The court distinguished scientific findings from those which require the personal observation of the declarant. The court stated:

> " . . . a releasee's interest in cross-examining a laboratory technician regarding a scientific fact is less

> than would be his interest, for example, in confronting a hearsay declarant regarding what the declarant may have seen. The truth of the former can be verified through methods of science; the truth of the latter can best be verified through the rigor of cross-examination, conducted under the circumspect eye of the district court." *McCormick* at 222.

In *McCormick*, the court also noted that the defendant could have gotten a subpoena order requiring the technicians who performed the analysis to testify, but chose not to do so. The defendant further elected not to have his specimen retested.

Second Circuit

The Second Circuit similarly held that the admission of drug identification testimony by a state toxicologist did not violate a defendant's right of confrontation where "only one of the testing procedures required a subjective evaluation by the testing chemist . . . [and] the remaining tests were mechanically objective in nature." *Reardon v. Manson*, 806 F.2d 39, 40-41 (2nd Cir. 1986), *cert.denied*, 481 U.S. 1020 (1995). In *Reardon* the court further indicated that the defendants had the right under state law to subpoena the testing chemists as their own witnesses, but chose not to. The court, quoting *United States v. Inadi*, 106 S.Ct. 1121, 1127-29, said, "it has become settled that, at least in those borderline cases where the likely utility of producing the witness is remote, the Sixth Amendment's guarantee of an opportunity for effective cross-examination is satisfied where the defendant himself had the opportunity to call the declarant as a witness."

Again in *United States v. Rosa*, 11 F.3d 315 (2nd Cir 1993), *cert. denied*, 116 S.Ct. 264 (1995), autopsy reports were held admissible by the Second Circuit. An autopsy report's "particular guarantees of trustworthiness" were based on the following factors:

> " . . . (3) 'the existence of statutorily regularized procedures and established medical standards ac-

cording to which autopsies must be performed and reports prepared,' and (4) 'the fact that autopsies are carried out in a laboratory environment by trained individuals with specialized qualifications.' " *Id.* at 333, quoting *Manocchio* at 777.

b. SUBJECTIVE TESTS AND REPORTS

First Circuit (Kayne)

Conversely, in *Kayne*, the appraisal of rare coins is a highly subjective opinion of value. It is neither objective nor mechanical. Each coin grade is the product of opinions of value involving qualities such as eye appeal, artistic values and, in the words of one expert: "it's just a feeling." Furthermore, the opinions are based on a standard that is set by a private company and is subject to "changing interpretations" by that company and those who claim to use its standard. Moreover, there was no testimony regarding the qualifications of the expert numismatists who graded the coins because their identities were unknown. In addition, the certificates contained no indication as to the facts or reasoning process upon which the opinions are based and they bear a disclaimer that they do "not constitute a guarantee that . . . others will not reach a different conclusion as to grade."

The First Circuit acknowledged the importance of expert testimony regarding the value of rare coins: "[o]ne could hardly expect a lay jury to form conclusions about such an esoteric subject as the value of rare coins without the help of experts." *Kayne* at 12, (App: a14). It further responded to the petitioner's objections to the allowance of certain expert testimony by stating:

> "The defendants complain, however, that the opinions were not based on consistent standards, and were subject to factors of taste and assessment of the market, and that the experts often disagreed among themselves. This is not unusual. These

matters are properly the subject of searching cross-examination." *Id.*

The court, however, admitted the content of the certificates even though cross-examination of the experts who formed the opinions as to the value of the coins was not possible because the experts were unknown, and there was no possibility of any further evaluation of the coins because they were no longer available.

The *Kayne* court, held that the testimony regarding certificates satisfied Fed. R. Evid. 803(6) and thus was admissible. The court examined foundation testimony with regard to Fed. R. Evid. 803(6), but not with respect to the requirements of Fed. R. Evid. 702 and 705.

Ninth Circuit

The Ninth Circuit in *United States v. McClintock*, 748 F.2d 1278 (9th Cir. 1984), *cert.denied*, 474 U.S. 822 (1985), recognized the tension between Fed. R. Evid. 803(6) and Fed. R. Evid. 702 and 705. The court held that the allowance of reports of in-lab evaluations of gemstones went to an "essential element of the case -- the quality of the stones . . .", *id.* at 1291, and thus denied the defendant his Sixth Amendment right to confront his accusers. The court further stated, "because of the various means of evaluation and apparent subjective decisions that enter into the evaluation of gems, McClintock's confrontation of the preparers of the reports may have been valuable to his defense." *Id.*

Moreover, in *Waddell v. Commissioner of Internal Revenue*, 841 F.2d 264 (9th Cir. 1987), the Ninth Circuit refused to admit under the business records exception of the hearsay rule, an appraisal prepared by a professional appraiser to prove the value of a terminal. The appraiser had died prior to trial. The court, quoting the tax court, stated, "if this report were admissible as the appraiser's business record, 'any appraisal report prepared by any appraising company in the

country would come in without the appraiser having to be there to verify it.' " *Id.* at 267.

D.C. Circuit

The question presented in *Washington Coca-Cola Bottling Works v. Tawney*, 233 F.2d 353 (D.C. Cir. 1956), was whether the records of examinations made by one of several physicians engaged in group practice may be received in evidence under the Federal Shop Book Rule upon being identified by a physician having access to the records and familiar with the procedures by which they were regularly kept. The court held the records admissible. The court distinguished its holding from *New York Life v. Taylor*, 147 F.2d 297 (D.C. Cir. 1945), which held a hospital report containing an opinion regarding the existence of a psychoneurotic condition inadmissible, by stating:

> "Regularly recorded facts as to the patients condition or treatment on which the observations of competent physicians would not differ are of the same character as records of sales or payrolls . . . The present case concerns the recording of a physician of his observations of physical facts as plain to the trained eye as a compound fracture and upon which competent physicians would not be likely to disagree." *Washington Coca-Cola Bottling Works* at 354.

Lyles v. United States, 254 F.2d 725, 731 (D.C. Cir. 1957), *cert.denied*, 356 U.S. 961 (1958), found written psychiatric opinions inadmissible. The court held:

> " . . . the admission of a written *opinion* of a psychiatrist only by the naked record of his recorded conclusions, without his being present and with no opportunity to cross-examine as to the foundation of the opinion, is plainly not warranted by the language of the Federal Shop Book Act . . . a fact can be testified to by any witness, but, with a few exceptions an opinion can be given in evidence only

by an expert and the qualifications as an expert and reasons for his opinion are part of the premise for allowing him to testify." *Id.*

Fifth Circuit

The Fifth Circuit in *United States v. Williams*, 447 F.2d 1285 (5th Cir. 1971), *cert.denied*, 405 U.S. 954, *reh'g denied*, 405 U.S. 1048 (1972), held that an expert witness' presence at trial and his availability for cross-examination satisfied the defendant's constitutional right to confrontation regardless of whether his testimony fell within an established hearsay exception. *Id.* at 1290. At issue in the case was the expert's valuation of two oil and gas producing properties. The court stated, "[h]ad the Government attempted to introduce the appraisal reports in evidence without calling the expert who had prepared them and offering an opportunity for cross-examination, then Williams' right of confrontation would have been infringed . . ." *Id.*

Eighth Circuit

In *United States v. Kail*, 804 F.2d 441 (8th Cir. 1986), a case strikingly similar to *Kayne*, the court held the testimony of the government's experts regarding the value of rare coins admissible. During the trial, the qualifications of each expert as a professional numismatist were established. Additionally, on direct and cross-examination, the experts set out the basis of the grading and pricing of the rare coins. In refuting the defendant's claim of a violation of his constitutional right of confrontation, the Eight Circuit stated, "[i]n such cases, the availability of cross-examination safeguards the right to confrontation . . . the expert witnesses were cross-examined with regard to the basis of their valuations of the inventoried coins." *Id.* at 447. Quoting from *Polk v. Ford Motor Co.*, 529 F.2d 259, 271 (8th Cir. 1976), *cert. denied*, 426 U.S. 907 (1976), the court further said, "[t]he weaknesses in the underpinnings of such opinions may be developed upon cross-examination

and such weakness goes to the weight and credibility of the testimony." *Kail* at 448.

Court of Claims

Again, in *Forward Communications Corp. v. United States*, 608 F.2d 485 (Ct. Cl. 1979), the court, in excluding a report as to the valuation of property, said:

> "In other words, unless Rule 803(6) is deemed to override the opinion rules, it should not be construed to allow the introduction of expert opinions without opportunity to ascertain the qualifications of the maker, the extent of his study or for other reasons to cross-examine him. Otherwise, the report of every appraiser would be admissible upon the mere showing that the preparer was in the business of making such appraisals without more." *Id.* at 510.

It is this right of cross-examination that is central to the appellant's contentions and underscores the tension between Fed. R. Evid. 803(6) and Fed. R. Evid. 702 and 705. If the experts had been produced, defense counsel would have been entitled to cross-examine them, under Fed. R. 702 and 705, as to their qualifications and, most importantly, as to the basis of their opinions. Indeed had the government produced the experts, the defendant would have been entitled, under Fed. R. Crim. Proc. 16(a)(1)(E), to obtain their qualifications and the bases and reasons for their opinions even before trial. Even without the coins in the courtrooms, defense counsel could have determined what interpretation of ANACS standards was used by the experts and, with the use of other coins, identified the points of divergence between their judgments and those of Mr. Kalp. The court, however, under the business records exception to the hearsay rule, permitted the jury to hear a recital of the certificates.

The magnitude of the departure by the First Circuit, from its own precedents as well as from those in other circuits, is especially obvious in the circumstances of this case, where:

(1) the grades are the product of highly subjective opinions of value, involving qualities such as eye appeal, artistic values and, in the words of one expert: "it's just a feeling",

(2) the opinions are based on a standard that is set by a private company and is subject to "changing interpretations" by that company and those who profess to use its standard,

(3) the certificates contain no explication of the facts or reasoning process upon which the opinions are based,

(4) the certificates bear a disclaimer that they do "not constitute a guarantee that . . . others will not reach a different conclusion as to grade",

(5) the coins themselves are unavailable,

(6) the graders are unknown, and

(7) the opinions strike at the heart of the defense.

Kalp's counter-attack was obviously not enough. What the petitioner needed, and what he confidently believes would have turned the tide, was to have the coins in the courtroom for use in challenging the ANA graders, and Kalp as well, to defend their grades. At the very least, the petitioner needed to cross-examine the ANA graders to determine their interpretations of the ANA standards, having in mind the changing interpretations to which Montgomery testified (4:63), and to show that their level of expertise in grading according the ANA standards was far below Kalp's. However, because of circumstances and the court's ruling the petitioner had neither the coins nor the ANA graders. The result was that the petitioner's principal defense, that the coins were accurately graded according to ANA standards, was destroyed.

The tension between Fed. R. Evid. 803(6) and Fed. R. Evid. 702 and 705 is clear. Just as clearly, the First Circuit

has gone well beyond the limits set in other circuits for the admission of expert testimony under the business records rule. Under these circumstances and considering the sixth amendment implications of this issue, certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

Francis J. DiMento
DiMENTO & SULLIVAN
Seven Faneuil Hall Marketplace
Third Floor
Boston, Massachusetts 02109-1649

Dated: September 16, 1996

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

RICHARD KAYNE
5613 Northwest 39th Avenue
Boca Raton, FL
SSN# 220-52-5875

(Name and Address of Defendant)

Francis DiMento
Attorney for Defendant

JUDGMENT IN A CRIMINAL CASE
CASE NUMBER: 91-10202-01-DPW

THE DEFENDANT ENTERED A PLEA OF:

[❑ guilty ❑ nolo contendere] as to count(s) _____ ,
and not guilty as to count(s) _____ .

THERE WAS A:
[❑ finding ❑ verdict] of guilty as to count(s) 1, 2, 3, 4, 6, 7, 8, 17, 19, 20, 21, 22, 23, 25 and 28 .

THERE WAS A:
[❑ finding ❑ verdict] of not guilty as to count(s) 9, 10, 12, 24.
❑ judgment of acquittal as to count(s) 11 .
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

mail fraud in violation of Title 18 United States Code Section 1341

IT IS THE JUDGMENT OF THIS COURT THAT:
the defendant is hereby committed to the custody of the Attorney General for a period of thirty-six (36) months on Counts 1,2,3,4,5,6,7,8 and 17, to be served concurrently with each other, and thirty-six (36) months on Counts 19, 20, 21, 22, 23, 25 and 28, to be served concurrently with each other and consecutive with the sentences imposed on Counts 1,2,3,4,6,7,8 and 17, execution of said sentence is suspended on Counts 19,20,21,22,23,25 and 28 and the defendant is placed on probation for a period of three (3) years.

SEE ATTACHED SHEET FOR SPECIAL CONDITIONS OF PROBATION

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of resident:

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $750.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 1, 2, 3, 4, 6, 7, 8, 17, 19, 20, 21, 22, 23, 25 and 28 as follows:

IT IS FURTHER ORDERED THAT counts 5, 13, 14, 15, 16, 18, 26, 27 and 29 are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

The Court orders commitment to the custody of the Attorney General and recommends:

March 8, 1994

Date of Imposition of Sentence

/s/_____
Signature of Judicial Officer

Douglas P. Woodlock – U.S. District Judge
Name and Title of Judicial Officer

March 21, 1994
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on_____to_____at
Date

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By_____
Deputy Marshall

SPECIAL CONDITIONS OF PROBATION
United States v. Richard Kayne
Criminal Action No. 91-10202-01-DPW

The Court ORDERS the following as special conditions of probation as directed by the Chief U.S. Probation Officer during the period of probation:

The defendant shall make restitution in the amount of $339,466, jointly and severally, to the victims identified by the probation office.

The defendant shall provide all financial information as requested by the probation office.

The defendant shall not incur any new credit charges or open any new lines of credit without prior approval of the probation office.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 94-1406

UNITED STATES,

Appellee,

v.

RICHARD G. KAYNE,

Defendant-Appellant.

JUDGMENT

ENTERED: July 24, 1996

This cause came on to be heard on appeal form the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By The Court
WILLIAM H. NG, CLERK

By: Mary S.O.
Administrative Manager

[cc: Messrs. DI Mento and Kayne]

United States Court of Appeals
For the First Circuit

No. 94-1406

UNITED STATES,

Appellee,

v.

RICHARD G. KAYNE,

Defendant - Appellant.

No. 94-1407

UNITED STATES,

Appellee,

v.

EDWARD B. KALP,

Defendant - Appellant.

APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

[Hon. Douglas P. Woodlock, U.S. District Judge]

Before

Torruella, *Chief Judge*,
Cyr, *Circuit Judge*,
and Skinner,* *Senior District Judge*.

Francis J. DiMento, with whom *DiMento & Sullivan* was on brief for appellant Richard G. Kayne; *John L. Roberts*, by Appointment of the Court, for appellant Edward B. Kalp.

Mark J. Balthazard, Assistant United States Attorney, with whom *Donald K. Stern*, United States Attorney, was on brief for appellee.

July 24, 1996

* Judge Skinner, of the District of Massachusetts, sat by designation, heard oral argument in this matter and thereafter recused himself. The remaining two panelists therefore issue this opinion pursuant to 28 U.S.C. § 46(d).

TORRUELLA, *Chief Judge*. Defendants-appellants Edward Kalp and Richard Kayne were charged with twenty-nine counts of mail fraud, in violation of 18 U.S.C. § 1341. After a six week trial, a jury convicted both defendants on fifteen counts and acquitted them on four; the judge granted a motion for acquittal on one; and the government dropped the remaining counts. The defendants were sentenced to 36-months imprisonment, and ordered to pay $339,466 in restitution. On appeal, Kayne and Kalp argue (1) that jeopardy had attached in a prior government proceeding; (2) that certain evidence was improperly admitted; (3) that the evidence submitted below was not sufficient to sustain the convictions; and (4) that Kalp received ineffective assistance of counsel at trial. For the reasons laid out below, we affirm.

I. BACKGROUND

In the late 1970s, many new investors entered the market for rare coins. Unlike knowledgeable hobbyists and "vest pocket" dealers, these newcomers had no specialized expertise, and were just looking for a stable investment. Seeking to capitalize on this booming market, defendants Edward Kalp and Richard Kayne left a distinguished Boston coin brokerage and established the Rare Coin Galleries of America ("RCGA") in July 1982. Kalp, the President of RCGA, functioned as the in-house numismatist, examining and valuing coins for purchase from wholesalers, and pricing them for resale. Kayne, as RCGA's marketing director, recruited financial planners and solicited customers. For four years RCGA operated successfully, generating millions of dollars in revenues from approximately 3,000 customers.

A typical RCGA investor paid between $5,000 and $25,000 for a portfolio of coins. In the rare coin market, the value of a coin is dependent upon its "grade," which is a numismatic measure of comparative wear on a 70 point scale. Small distinctions in grade can yield large differences in the value of a coin. For example, among relatively pristine, un-

circulated "mint state" ("MS") coins, an MS65 coin can fetch ten times the price of an MS63. For "certified" coins, grade is determined by a certification service which typically employs a panel of numismatists. Prior to 1986, the only independent grading service was the American Numismatic Association Certification Service ("ANACS"). For "raw" coins (which have not been certified), grade and value may be established between two knowledgeable collectors or an amateur may rely on the representation of a respected numismatist. Most of the raw and certified coins which RCGA supplied its customers were purported to be MS65 coins.

By mid-1986, at least two federal agencies had received many complaints from RCGA customers asserting that the coins sold by RCGA were of substantially lower quality and value than represented. After a preliminary investigation in July 1986, the United States Postal Service applied for and was granted authority by the late Chief Judge Andrew Caffrey of the District of Massachusetts to intercept RCGA's mail.

At the same time, the Federal Trade Commission ("FTC") was conducting a parallel nationwide investigation of the rare coin investment market. The investigation quickly focused on RCGA, among others. On September 16, 1986, the FTC instituted a civil action alleging that RCGA was engaged in unfair and deceptive business practices under 15 U.S.C. § 45(a). This case was also assigned to Judge Caffrey, who forthwith entered a temporary restraining order "freezing" not only the business but the personal assets owned by Kayne and Kalp. On October 14, RCGA filed a Chapter 11 petition for bankruptcy reorganization, which was removed to the district court and consolidated with the Postal Service and FTC actions. The following week, Judge Caffrey granted preliminary injunctions requested by the Postal Service and the FTC, and appointed a Bankruptcy Trustee, who initiated adverse proceedings against Kayne and Kalp.

The conclusion of the civil litigation came the following spring, when the FTC, the Trustee, Kayne, and Kalp entered

into a settlement agreement requiring Kayne and Kalp to surrender $2.2 million in personal assets to the Trustee and never to market coins to the public again. Also pursuant to this agreement, the FTC's claim for $11.9 million in consumer restitution was given priority status for payment of the Trustee.

On January 11, 1991, an indictment charging Kalp and Kayne with 29 counts of mail fraud was filed, based on the correspondence intercepted the summer of 1986. The prosecution's evidence consisted of testimony from former RCGA employees, financial planners, suppliers, and customers, as well as coin dealers and numismatic experts. After almost six weeks of testimony, the jury convicted Kayne and Kalp of 15 counts of fraud. The prosecution dropped nine counts prior to their submission to the jury, the jury acquitted on four counts, and the district judge acquitted on one count. Defendants have been sentenced to 36 months' imprisonment and ordered to pay $339,466 in restitution. The sentence has been stayed pending resolution of this appeal.

II. DISCUSSION

A. Double Jeopardy

Both defendants have asserted that jeopardy attached to the 1986 civil litigation and should bar this prosecution. This defense has surfaced for the first time on appeal. Even though the fundamental constitutional issue of double jeopardy was not raised at trial, we will entertain the appeal, but review only for plain error.[1] *See, e.g., United States v. Rivera*, 872 F.2d 507, 509 (1st Cir.), *cert. denied*, 493 U.S. 818 (1989).

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[1] The government argues that the defendants' appendix consists almost entirely of documents which were not part of the record below and which the district court declined to certify to this court, and therefore they should be stricken from the appendix. *See Massachusetts v. United States Veterans Admin.*, 541 F.2d 119, 123 n.5 (striking portions of an appendix

The Double Jeopardy clause protects against "multiple punishments for the same offense," even if one of the proceedings is civil and one criminal, regardless of the sequence. *United States v. Halper*, 490 U.S. 435, 439 (1989). In determining whether the protections of the Double Jeopardy Clause are implicated, our first line of inquiry is whether the civil sanction constituted "punishment," *see United States v. Stoller*, 78 F.3d 710, 720-21 (1st Cir. 1996); our second is whether the purported punishments are for the same offense, *Halper*, 490 U.S. at 439. Because we conclude that the civil sanction in this case did not constitute punishment, we discern no plain error.

Defendants argue that the civil proceedings against them were the equivalent of civil forfeiture proceedings and imposed punishment for the same offense in two or more separate proceedings. In characterizing their settlement with the Bankruptcy Trustee and the FTC as a punitive forfeiture, they cite two expansive double jeopardy opinions from other circuits which, since oral argument, have been reversed by the Supreme Court. *See United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *rev'd* __ U.S. __, 1996 WL 340815 (1996); *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *rev'd sub nom. Ursery*, __ U.S. __, 1996 WL 340815.

Assuming, *arguendo*, that the civil proceeding against defendants is the equivalent of a civil forfeiture proceeding, the Supreme Court's opinion in *Ursery* makes it clear that the 1986 civil proceeding was not "punishment" for double jeopardy purposes. *Ursery*, __ U.S. at __, 1996 WL 340815, *9. In that case, the Supreme Court reaffirmed its "traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause." *Id.*

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that were not part of the record in the district court). Even assuming these documents are properly before us, defendants cannot prevail.

Furthermore, even to the extent that defendants' 1986 civil proceeding was not a civil forfeiture proceeding, it was by nature remedial. The monetary sanction was exacted in a bankruptcy case, and the $2.5 million paid to the trustee was used to pay a portion of claims against the defendants totaling $11.8 million resulting from their sale of coins. A monetary sanction which has no punitive function, *i.e.*, has no purpose other than restitution or compensation for the loss engendered by the defendants' conduct is not punishment within the ambit of the double jeopardy clause. *Halper*, 490 U.S. at 446-49. This is a near-perfect exemplar of compensation for loss, and does not constitute punishment for purposes of double jeopardy, notwithstanding its financial impact on the defendants.

In view of our conclusion that there was no duplication of punishment, it is unnecessary to consider the second part of the double jeopardy analysis: whether the purported punishments were for the same offense. In any case, we note that the offenses charged in this indictment contain crucial elements that by no stretch of the imagination could be part of the resolution of the bankruptcy case or of the underlying FTC and Postal Service cases; *e.g.*, criminal intent to defraud and devising a scheme to defraud. Hence there was no double jeopardy. *See Blockburger v. United States*, 284 U.S. 299 (1932).

B. Evidentiary Challenges

1. Appraisals and valuations by dealers of "raw" coins supplied by RCGA

The defendants argue that evidence of the value of the coins sold by the defendants was erroneously admitted. The government offered, and the district court admitted, testimony of eight coin dealers that the coins bought by the RCGA customers were of substantially lower quality and value than represented in the accompanying documentation. On appeal, the defendants argue that this testimony was not properly the

subject of expert testimony and was irrelevant, neither of which grounds were argued to the district judge. As neither ground was argued below, we review only for plain error. *See, e.g., United States v. Montas*, 41 F.3d 775 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1986 (1995).

The value of the coins involved in a prosecution for their fraudulent sale is indisputably relevant. The fact that the subject matter is not "scientific" is no bar to admissibility of expert testimony. Federal Rule of Evidence 702 specifies that expert testimony covering "scientific, technical, or other specialized knowledge [which] will assist the trier of fact to understand the evidence or to determine a fact in issue" is admissible. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) (emphasis omitted). A trial judge "enjoys broad discretion in determining the admissibility of expert testimony." *Montas*, 41 F.3d at 783. Opinions of value are a traditional subject of expert testimony, and it is well within the discretion of the district judge to admit them. One could hardly expect a lay jury to form conclusions about such an esoteric subject as the value of rare coins without the help of experts. The defendants complain, however, that the opinions were not based on consistent standards, and were subject to factors of taste and assessment of the market, and that the experts often disagreed among themselves. This is not unusual. These matters are properly the subject of searching cross-examination. *See Daubert*, 113 S. Ct. at 2798. Defendants argue further that this testimony should have been excluded under Fed. R. Evid. 403, because its prejudicial effect outweighed its probative value. This determination is committed to the sound discretion of the trial court, and will be overturned only in "extraordinarily compelling circumstances," *Montas*, 41 F.3d at 783, which we do not detect in this case. Review of the record reveals that the experts were experienced, the chains of custody of the coins were carefully established, the experts' methods were explained, and the appraisals were reasonably current. Thorough cross-examina-

tion was permitted on all of the issues, such as subjective judgments and variable markets, which might impeach the expert testimony. We perceive no error, plain or otherwise.

2. Purchasers' evidence of resale

Defendants complain further that several of the purchasers from RCGA were permitted to testify about the price they realized on resale of the coins. *See United States v. DiMarzo*, 80 F.3d 656, 659-60 (1st Cir. 1996). Their argument that this testimony was outside the competence of lay witnesses under Fed. R. Evid. 701 is far off the mark. This testimony was not opinion testimony at all, but a simple recitation of an observed phenomenon: the price paid for the coins. A more cogent argument is that these may have been distress prices, rather than fair market prices. This might have been a ground for exclusion in a clear case of a distress sale, but whether they were distress sales or not, in the context of the evidence in this case, was a question of fact properly left to cross-examination and ultimately to the jury. This was the procedure correctly permitted by the district judge.

3. ANACS' evaluations of RCGA raw coins

Defendants challenge the admission of testimony concerning the grades the American Numismatic Association Certification Service (ANACS) assigned to certain coins sold by RCGA. Throughout the trial the government attempted to introduce ANACS certificates of value obtained after RCGA's bankruptcy by two dissatisfied customers, Dr. Anthony Scapicchio ("Scapicchio") and Caleb Morgan ("Morgan"). While Morgan's coins were not the subject of any count of the indictment, Scapicchio's were the subject of Count VIII. The ANACS graders who prepared these certificates were not available for cross-examination, and, indeed, were not even identified.

On the fourth day of trial, the district judge conditionally admitted the certificates, based on the testimony of Richard

Montgomery, director of ANACS from 1980 to 1987, concerning ANACS' valuation procedure. The next day, the judge allowed Morgan to read his certificates to the jury. The day after that, the judge excluded a similar reading by Scapicchio and struck the Morgan testimony. Finally, on the sixteenth day of trial, the court ruled that the jury is fully informed and is in a position to make a discriminating judgment about how reliable, if at all, the ANACS determinations are," and permitted a postal inspector to read the Morgan and Scapicchio certificates to the jury at the close of the government's case. Since specific objections were made to the admission of these certificates, we review for abuse of discretion. *See, e.g., Cameron v. Otto Bock Orthopedic Industry, Inc.*, 43 F.3d 14, 16 (1st Cir. 1994).

We find no such abuse here. The foundation for admission of a business record under Fed. R. Evid. 803(6) requires both the testimony of a qualified custodial witness and a showing that the declarant was a person with knowledge acting in the course of a regularly conducted business activity. *See, e.g., Petrocelli v. Gallison*, 679 F.2d 286, 290 1st Cir. 1982). Montgomery's evaluation adequately established the genesis of the records and their subsequent custody. *See, e.g., Wallace Motor Sales v. American Motors Sales Corp.*, 780 F.2d 1049, 1061 (1st Cir. 1985) (noting that the qualifying witness need not have actually prepared the record, but "is simply one who can explain and be cross-examined concerning the manner in which the records are made and kept").

Further, we do not find that the "source of information of the method or circumstances of preparation indicate lack of trustworthiness" in the certificates. Fed. R. Evid. 803(6) (excluding business records on that basis); *see Petrocelli*, 679 F.2d at 291 (excluding business record testimony where the records were "so cryptic that pure guesswork and speculation [was] required to divine the source of the cited information"). It was not for the trial judge, but the jury, to determine whether the opinions in the certificates reliably assigned values to the coins. Indeed, the district court allowed the defense to conduct

liberal (if not excessive) inquiry into the unreliability of the ANACS certificates.

Defendants also challenge the admissibility of this evidence on constitutional grounds, claiming that they were denied their Sixth Amendment right of confrontation.[2] We find *Manocchio v. Moran*, 919 F.2d 770 (1st Cir. 1990), *cert. denied*, 500 U.S. 910 (1991), controls our analysis in this matter. There, the government sought to enter an autopsy report about an autopsy performed by a forensic pathologist who had since moved to Israel. The testimony of another signatory to the report, the keeper of the records, was offered in order to lay the foundation for admission. *Id.* at 772. Relying on *United States v. Inadi*, 475 U.S. 387, 394 (1986), we found that the government was not required to demonstrate the examining pathologist's unavailability in order to enter the report. We specifically stated that the reasoning in *Inadi* which led us to that conclusion would apply equally to other types of hearsay exceptions -- including business records. *Id.* at 774; *see White v. Illinois*, 502 U.S. 346, 354 (1992) ("[U]navailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding."). Having determined that, our decision in *Manocchio* noted that it was "left . . . with reliability as the determining factor for the admissibility of the autopsy report under the Confrontation Clause." *Manocchio*, 919 F.2d at 776. However, we specifically noted that reliability could be shown by "showing that the evidence falls within a firmly rooted hearsay exception." *Id.*; *see White*, 502 U.S. at 356, n.8 (noting that " 'firmly rooted' " exceptions carry sufficient indicia of reliability to satisfy the reliability requirement posed by the Confrontation Clause"); *United States v. Trenkler*, 61 F.3d 45, 64 (1st Cir. 1995) (Torruella, C.J., dissenting on

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[2] The Government argues that defendants have waived this issue by failing to object on Confrontation Clause grounds below. Regardless of whether the issue was waived, the argument fails.

other grounds). Since we have already shown that to be true in the present case, we need not address this argument further.[3]

C. Sufficiency of the Evidence

Appellants next challenge the sufficiency of the evidence marshalled against them. We review such challenges to "determine whether a rational jury could find guilt beyond a reasonable doubt," *United States v. Flores-Rivera*, 56 F.3d 319, 232 (1st Cir. 1995), viewing the evidence in the light most favorable to the verdict, *id.* Our review of the record here persuades us that the evidence was sufficient to warrant conviction beyond a reasonable doubt.

First, the government presented extensive evidence of systematic overgrading. Ten customers testified that they sold their portfolios for a small fraction of the purchase price. Two experts indicated that the coin market did not account for this precipitous drop. Two suppliers of RCGA's coins indicated that Kalp only purchased MS63 coins. An expert witness correlated RCGA's records with pricing data and determined that RCGA only paid MS63 prices for the coins it sold to consumers. Several former RCGA employees testified *inter alia* that coins were routinely upgraded. One employee testified that Kayne ordered her to alter an ANACS certificate.

As for the ANACS certificates, as noted above, the district court allowed the defense liberal inquiry into their unreliability. Indeed, defense counsel was repeatedly allowed to cross-examine coin dealers on subjects well beyond the scope of direct examination. Although the court invited the defense to propose a limiting instruction, this offer was not accepted.

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[3] Defendants seek to rely on the Confrontation Clause analysis in *United States v. McClintock*, 748 F.2d 1278 (9th Cir. 1984), *cert. denied*, 474 U.S. 822 (1985). However, that opinion was written before *Inadi* or *White* were decided. Rather than look to *McClintock* for guidance, therefore, we will apply the case law of this circuit, which has been informed by the later Supreme Court decisions.

The testimony about the certificates came into evidence after eleven separate appraisals were presented to the jury. Neither the ANACS documents nor the appraisals were allowed to come into evidence, and the district judge required the prosecution to structure the presentation of the certificates to be virtually identical to the appraisals.

Third, systematic overgrading was only a part of the government's demonstration of fraud. Several employees indicated that statements in RCGA's promotional literature were misleading by stating that RCGA had achieved $90 million in sales, had a multi-million dollar inventory, and had a Paris affiliate. Five customers whom RCGA cited as making substantial profits on a "liquidation" report sent to prospective investors testified that they never received payment, or were paid only after instituting civil litigation. There was evidence of a $1 million discrepancy in RCGA's books, that Kayne encouraged financial planners to conduct transactions in cash, and that Kayne and Kalp routinely skimmed cash from office accounts.

D. Ineffective Assistance of Counsel

We trumpet the message for the umpteenth time that allegations of ineffective assistance of counsel must be raised initially before the district court, typically by a motion under 28 U.S.C. § 2255. *See, e.g., United States v. Costa*, 890 F.2d 480, 482-83 (1st Cir. 1989) (discussing rationale behind rule). Moreover, the asserted ineffective assistance of counsel consisted of counsel's failure to raise the issue of Double Jeopardy; in view of our ruling on that claim, it may simply be that trial counsel was quite perceptive.

III. CONCLUSION

For the foregoing reasons, the opinion of the district court is ***affirmed***.